Office-Supreme Court, U.S.
FILED
JUL 27 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 328

SAMUEL G. BENO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

W. PAUL FLYNN, Esq.,
157 Church Street,
New Haven, Connecticut.

FRANK J. RACCIO, Esq.,
BERNARD P. KOPKIND, Esq.,
CHARLES L. FLYNN, Esq.,
Of Counsel.
157 Church Street,
New Haven, Connecticut.

THE MACK CO., NORTH HAVEN, CONN

INDEX

	PAGE
Opinion Below	1
Statement Of Jurisdiction	2
Statement Of The Case	2
Issues Presented	3
Reasons For Allowance Of The Writ	3
Statement Of Facts	3
As To The First Question Presented	6
As To The Second Question Presented	11
Additional Reasons For Allowance Of The Writ	14
Conclusion	15

CITATIONS

	PAGE
CASES:	
Boyd vs. *United States*, 116 U.S. 616 (1886)	7, 9
Clinton vs. *Virginia*, ——U.S.——, 84 S. Ct. 1186; 12 L. Ed. 2d 213 (1964)	8
Escobedo vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964)	10, 11, 12, 13
Gideon vs. *Wainwright*, 372 U.S. 335 (1963)	12
Goldman vs. *United States*, 316 U.S. 129 (1942)	7
Lopez vs. *United States*, 373 U.S. 427 (1963)	14
Massiah vs. *United States*, —— U.S. ——, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)	11, 12
On Lee vs. *United States*, 343 U.S. 747 (1952)	7
Silverman vs. *United States*, 365 U.S. 505 (1961)	7, 8
United States vs. *Beno*, 324 F.2d 582 (2d Cir. 1963)	2
United States vs. *Massiah*, 307 F.2d 62 (2d Cir. 1962)	12
Wong Sun vs. *United States*, 371 U.S. 471 (1963)	9
OTHER REFERENCES:	
WIRETAPPING AND EAVESDROPPING — SUMMARY REPORT OF HEARINGS 1958-61 by the Sub-Committee on Constitutional Rights of the Committee of the Judiciary, United States Senate, 87th Cong. 2nd Sess.	15

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No.

SAMUEL G. BENO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on May 28, 1964.

The opinion of the Court of Appeals (Kaufman and Hays, Circuit Judges, and Bartels, District Judge sitting by designation) is thus far unreported and is reprinted in Petitioner's Appendix A. An earlier conviction was reversed and remanded

and the decision in that case is reported in 324 F.2d 582 (2d Cir. 1963).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

STATEMENT OF THE CASE

The judgment of the Court of Appeals, from which Petitioner seeks review, affirmed a judgment of conviction of the Petitioner, for a violation of Title 18 United States Code, Section 202. The pertinent parts of Section 202 are set forth in Petitioner's Appendix B.

Upon the trial, the Petitioner was convicted as charged and was sentenced on January 20, 1964. (R. 149a)* Appeal was taken to the Court of Appeals for the Second Circuit; and that Court, on May 28, 1964, affirmed the conviction of the Petitioner. The Petitioner was charged in a one count indictment with a violation of Title 18 United States Code, Section 202. (R. 8a)

Thereafter, the Petitioner submitted an application to stay the mandate and to continue the defendant in bail pending a Petition for Certiorari and the panel granted said application on June 17, 1964. On June 29, 1964, Associate Justice Harlan extended the time within which Petitioner was to file this Petition to July 27, 1964.

---

* (References are to Appendix pages in the Court below).

ISSUES PRESENTED

I.

SECRET INTERROGATION OF A SUSPECT IS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT:

A. The element of physical intrusion is not necessary to violate the right of privacy.

B. Such a search is inherently unreasonable.

C. Such a search is unreasonable because it requires the suspect to be a witness against himself.

D. Such a search is unreasonable because it deprives the suspect of the opportunity to obtain counsel.

II.

WHERE THE INVESTIGATION HAS FOCUSED UPON A SUSPECT HE MUST BE AFFORDED THE OPPORTUNITY TO OBTAIN COUNSEL BEFORE HE IS INTERROGATED BY ANYONE.

REASONS FOR ALLOWANCE OF THE WRIT

STATEMENT OF FACTS

On September 17, 1961, the defendant had returned to his home town, Thompson, Connecticut, a small community in the northeastern corner of the state, to attend a memorial service for his grandmother. (R. 134a) During this family gathering, a sister-in-law asked the accused to donate some of his books to a branch of the community library that was to be established across the street from his family home. On that occasion, Beno indicated that his books were a bit too technical; but, he told his sister-in-law he would be willing to donate a set of encyclopedia if he could get one at a good price. (R. 134a)

On September 22, 1961, Beno was assigned a return of the Walden Book Company of Stamford, Connecticut for audit by his supervisor, Fogwell. This was on a Friday. On the following Monday, Beno discussed the productivity of the return with his acting supervisor, he discussed the company with another agent who had audited a prior year return, and he checked the office index card to determine any deficiencies produced by that prior audit. On the basis of the information and a quick perusal of the return, Beno decided to survey the return. After affixing a stamp to the return, signing and dating it, the return and the control card were thereafter outside of the control of the accused. The Walden return was surveyed the first thing on the morning of September 26, 1961, and he never had the return in his possession or control again.

Later the same morning, Beno called Richard Guinta, at the latter's place of business, a man that he had met some time prior to that date. (T. 12a, 22a) During this conversation, the defendant told Richard Guinta that he was interested in obtaining an encyclopaedia and good dictionary. (T. 13a, 26a, 27a, 28a) Richard Guinta told Beno that he did not know whether these items were carried by the Walden Book Co., but he would contact his brother, Charles Guinta, at the Walden Book Company. Charles Guinta's name appeared on the return that Beno had surveyed. (Ex. B)

Richard Guinta did call his brother at Walden about an encyclopaedia but, he did not understand that he was being used as an instrument in the solicitation of a bribe. (T. 33a)

After receiving the call from his brother, on September 26, Charles Guinta discussed the matter with a representative of the firm auditing the company's books, the president of Walden, and the company attorney, and he tried to phone the inspection service of the Internal Revenue Service. Having been

unable to reach the inspection service in Boston on September 26, a second call was placed on September 27, 1961. On the next morning two agents from the Inspection Service in Boston arrived at the Walden Company office in Stamford. (T. 35a-38a)

At about the time the agents were arriving in Stamford, Beno called Richard Guinta to inquire whether or not he had heard from his brother and Guinta told him that he had been unable to reach Charles. (T. 14a, 29a, 30a)

The federal agents, meanwhile, were requesting Charles Guinta to assist them in investigating the suspected shakedown. The agents pointed out that they would like to get Beno's answers to certain suggested subject matter recorded and were, therefore, allowed to install a hidden microphone in a bookcase in Guinta's office plus other paraphrenalia for tape recording. Sometime after the call to Boston on September 27, 1961 and luncheon with the federal agents on September 28, Charles Guinta had ordered a 24 volume set of the Britannica. The agents then explained the use of the recording equipment, the subjects that should be discussed and the plan for getting Beno to come down to the Walden office. (T. 71a, 86a, 87a)

Having devised the plan, Guinta, acting at the direction of the federal agents, made two calls to Beno on the morning of September 29, 1961. Failing to reach Beno on the second call, Guinta left word for Beno to call him. Later that morning, Beno returned the call, and Guinta told him he had a Britannica and proceeded to attempt to put the plan into effect. On that same day, the accused called his cousin, George Philip, for a loan of $250.00. Philip wasn't sure of the availability of the money and later that afternoon he told the defendant he didn't have the money. (T. 136a) Beno then called Guinta and cancelled the meeting for that day indicating he would be in touch on the following Monday.

On Sunday, October 1, 1961, the accused borrowed $75.00 from his girl friend, Erica Boerger, telling her at that time that he needed the money to buy some books. (T. 137a-138a)

The next morning Beno called Charles Guinta pursuant to the arrangement made on the precedent Friday and Guinta told him to come to the company office and gave him the directions. In the meantime, a Miniphon device was secreted upon Guinta's person and activated. The agents went over the program of discussion and removed themselves to an adjoining room, where, once conversation began, a federal agent could and did overhear by reason of a head set jacked into the tape recorder, the answers the accused would give to the pre-programmed discussion. Later on, by use of a further artifice, specifically suggested to the helpful assistant, Guinta, a fib was told to the defendant in order to induce him to take physical possession of the two cartons (Exs. K and L) containing the 24 volume Britannica. As this happened, the defendant was arrested for a violation of the bribery statute. It was clear that the over-hearing agents could not have heard that portion of the conversation covered by Exhibit I prior to the arrest of the accused.

AS TO THE FIRST QUESTION PRESENTED

SECRET INTERROGATION OF A SUSPECT IS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT.

A. The Element Of Physical Intrusion Is Not Necessary To Violate The Right Of Privacy.

Petitioner contends that the use of an assistant, instructed to surreptitiously interrogate a suspect, for the purpose of obtaining and recording incriminating statements, as was done in the instant case, was violative of the Fourth Amendment to the

Constitution of the United States prohibiting unreasonable searches and seizures. The Petitioner admits that the statements which were obtained were not made in a "house", nor was there a government "trespass" of the property, which was occupied by the Petitioner, at the time. Petitioner's contention in this regard has been rejected in the Court below because that Court determined that there was no unauthorized physical invasion, by the government, into a constitutionally protected area.

> *Cf. On Lee* vs. *United States*, 343 U.S. 747 at 751 (1952).

We advance the argument that this Petitioner has a right to privacy, under the Fourth Amendment, which cannot be limited by his presence at a particular place; that this right extends, not only to his personal property, but to his *person*, as well.

The concept of an unauthorized physical intrusion, as expounded in such cases as *Goldman* vs. *United States*, 316 U.S. 129 (1942); *Silverman* vs. *United States*, 365 U.S. 505 (1961); and *On Lee* vs. *United States*, 343 U.S. 747 (1952) has been taken to mean that absent such an unauthorized physical intrusion, or "trespass", (as it is sometimes called) the invasion of the individual's privacy is a proper function of the police authorities. We disagree with this interpretation.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . (that constitutes) the offense. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation."
>
> *Boyd* vs. *United States*, 116 U.S. 616, 630 (1886).

The question is not — "Has a trespass been committed" — which should be determinative of the ultimate answer, as to whether or not a sufficient invasion of privacy has occurred since the trespass may be a "circumstance of aggravation." The real question to be determined is whether or not the individual's personal security and personal liberty have been infringed upon.

The anomaly by which the Courts require an *invasion of property* in "eavesdropping" cases, was recognized by Douglas, J., concurring in *Silverman* vs. *United States*, *supra*, at 512, wherein he said:

> "An electronic device, on the wall of a house, is a permissible invasion of privacy according to *Goldman* vs. *United States*, *supra*. While an electronic device that penetrates the wall, as here, is not. Yet, the invasion of privacy is as great in one case as in the other. The concept of 'an authorized physical penetration into the premises', on which the present decision rests, seems to me to be beside the point."
>
> *Cf. Clinton* vs. *Virginia*, —— U.S. ——, 84 S. Ct. 1186, 12 L. Ed 2d 213 (1964).

where the "trespass" or invasion appears to have been limited to the penetration of the length of a thumb tack used to support the microphone on the outside wall of the house. Counsel has measured the average length of such a tack and discovered that the penetration in the *Clinton* case, *supra*, could not have exceeded 5/16ths of an inch. We should not have to resort to a ruler to measure the extent of Constitutional rights.

B. Such A Search Is Inherently Unreasonable.

The Petitioner contends that a trespass is but one of many means that is capable of characterizing a search as one that is unreasonable. Beno's property was not violated here. There

was no "breaking of his doors or rummaging through his drawers." Rather, and equally important, his person was violated by a process of surreptitious interrogation designed to *search his mind* for the tidbits of thought and intention that could incriminate him. Ideas, thoughts, and other mental processes are much more sacred than tangible property, for they are a very part of one's being. To say that the Fourth Amendment stops short of protecting the "possessions of the mind" against the type of inquisatorial extraction employed against Beno severely limits the useful life of the amendment. What was done constituted a search of Sam Beno, just as effectively as if the government had gone through his pockets. There can be no question but that the Fourth Amendment protects the intangible spoken word.

Wong Sun vs. *United States*, 371 U.S. 471, 485 (1963).

Petitioner contends that the "search of the interrogation", that is a surreptitious interrogation of a suspect for the purpose of obtaining incriminating statements, is, first of all, a search; and, secondly, that such method is *inherently unreasonable* in that it violates the personal security, integrity, and liberty of the individual.

Boyd vs. *United States*, *supra*.

C. Such A Search Is Unreasonable Because It Requires The Suspect To Be A Witness Against Himself.

We contend that the "search of interrogation" is an unreasonable search of the individual in that it deprives him of his rights under the Fifth Amendment. We favor a system of fairness in our accusatorial system of justice. That system recognizes that the guilty as well as the innocent have certain fundamental rights. We cannot permit, on the one hand, the payment of lip service to those rights; and, on the other hand, to allow them to be defeated by artifice or trick. We weaken

the foundation of justice if we say the people have the right to refrain from making an incriminating statement; but, if they are lulled into an atmosphere of security, or if they are duped in such a manner that they fail to recognize the danger of the situation, or the need to assert the right, the right is lost. There must be placed upon the law enforcer not only the duty of bringing criminals to justice, but the honor of upholding his Constitution and according its protection to the public. We fail in this if we permit the rights granted by our Constitution to be circumvented by artifice on the part of those whose sworn duty it is to uphold the Constitution. Beno was just as effectively deprived of his privilege against self-incrimination as if the government has used coercion to elicit the statements.

D. Such A Search Is Unreasonable Because It Deprives The Subject Of The Opportunity To Obtain Counsel.

We contend that the pre-arranged plan to interrogate Beno and to record his statements, accomplished in a clandestine manner and without advising him of his rights, deprived petitioner of his right to counsel in violation of the Sixth Amendment, and therefore rendered the search of interrogation unreasonable, and in violation of the Fourth Amendment. The interrogation, by design, was to produce statements to be used at the trial. Certainly the investigation had "focused" upon Beno to such an extent that he was in "need of legal aid and advice."

Escobedo vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964).

The import of *Escobedo* is that the right to counsel attaches when the investigation focuses upon the suspect. We further contend that the right to counsel is equated with the opportunity to obtain counsel. If the suspect is deprived of the opportunity by trick, his right to counsel has been violated. Depriv-

ing Beno of his right to counsel rendered the search of interrogation unreasonable and violative of the Fourth Amendment,

Massiah vs. *United States*, —— U.S. ——, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

Escobedo vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964).

To summarize the "search of interrogation," is unreasonable and therefore violative of the Fourth Amendment:

1. Because it is unquestionably an invasion of privacy;
2. Because, in its accomplishment, it deprives the interrogated his rights under the Fifth Amendment;
3. Because, in its accomplishment, it deprives the interrogated of the right to counsel.

There has not been an intrusion of property, it is true. However, there has been a trespass committed upon the individual and the rights granted to him under the Constitution, which must be considered equally repugnant.

AS TO THE SECOND QUESTION PRESENTED

Where The Investigation Has Focused Upon A Suspect He Must Be Afforded The Opportunity To Obtain Counsel Before He Is Interrogated By Anyone.

We have presented above the contention that the denial of the right to counsel, which is a necessary element in the successful accomplishment of the search of interrogation, makes the search unreasonable.

We now submit that the right to counsel, as an independent right — that is, independent of its effect on the Fourth Amendment — affords the Petitioner the basis for a claim of error in the Courts below.

Gideon vs. *Wainwright*, 372 U.S. 335 (1963) holds that an accused is entitled to a lawyer at his trial. *Massiah* vs. *United States*, —— U.S. ——, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) holds that the accused is entitled to a lawyer before trial and after indictment. *Escobedo* vs. *Illinois*, —— U.S. ——, 32 L.W. 4605 (1964) holds that a suspect is entitled to a lawyer before indictment.

It is true that in *Escobedo supra*, the petitioner was in the custody of police; and he was denied access to counsel he had already retained. Beno was not in the custody of the government agents; and, he had not retained counsel before the interrogation. However, the right to counsel cannot be confined to the right to seek the advice of counsel already retained. If this is the extent of the right, *Gideon* was wrongly decided, for; at his trial, he was neither represented by counsel, nor prevented from seeking the advice of counsel already retained. Rather, he was denied the *opportunity* to obtain the advice of counsel.

The right to counsel cannot be confined to instances in which the suspect is in actual police custody. The gist of the right is to afford expett advice to the suspect. The advice is just as necessary where the suspect is under interrogation and is being questioned without having been taken into custody or placed under arrest. In essence, Petitioner contends that the right to counsel is not confined to the jailhouse. The Supreme Court in *Massiah* vs. *United States*, *supra*, quoted with approval Judge Hays' statement in his dissenting opinion in the Court of Appeals that the accused was more seriously imposed upon because he did not know that he was under interrogation by a government agent.

Cf. United States vs. *Massiah*, 307 F.2d 72-73 (2d Cir. 1962.)

Beno's right to counsel began when the investigation "focused" upon him, that is, when the interrogation began. *Escobedo* vs. *Illinois*, *supra*, "Petitioner had become the accused, and the purpose of interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." *Ibid.*

The right to counsel must be equated with the opportunity to obtain counsel. Only the investigating officer can afford that opportunity to a suspect who is unknowingly interrogated for the purpose of obtaining incriminating statements. Can we say that because Beno did not know the purpose of the interrogation his right to counsel under the Sixth Amendment did not exist? We think not. The *necessary* implication in affording one the right to counsel, is, where the interrogation is surreptitiously performed, that the suspect must be informed of his constitutional rights. *Escobedo* vs. *Illinois*, *supra*. Only then can we say that he has been afforded the right to counsel.

Consider the dilemma of Messrs. Massiah, Escobedo and Beno. In all three cases the common denominator is the incriminating statement *unwittingly* uttered. Massiah did not know he was "broadcasting" to a government agent. Escobedo did not know that his admission to the police of "complicity" made him a principal in the murder, and Beno did not know that he was being prodded by a government assistant into making incriminating statements, which were simultaneously recorded, all to be used to convict.

It was Petitioner's claim at the trial, and on appeal, that Beno was entitled to a warning, and he was entitled to be advised as to his rights. *Massiah* and *Escobedo* reflect the seriousness of such a situation.

There is also reflected in those decisions a "policy", firstly, that a suspect, under the Fifth Amendment, need not speak at all, and secondly, under the Sixth Amendment, if he chooses to

speak it must be with the advice of counsel, or after having an opportunity to obtain counsel.

The "unsuspecting suspect" is helpless when the investigation is secretly conducted. How can we justify the deprivation of his constitutional rights? We can not longer justify the extraction of an incriminating statement on the basis that it was voluntarily made, for *Massiah* and *Escobedo* hold that the statement, though voluntary, is inadmissable if made at a time when the accused had the right to counsel.

There is implicit in *Massiah* and *Escobedo* a qualification of the "voluntary" doctrine. This qualification recognizes that an incriminating statement may not be voluntary even absent force or coercion. The concept of voluntariness has taken on a new meaning. We must realistically conclude that a man would not convict himself by his own words if he knows that he cannot be made to do so. Therefore, a statement can be truly voluntary only when there is an *affirmative* waiver of the Fifth and Sixth Amendment after the speaker is aware that he has a choice either exercise the rights that afford him the protection or to waive them. The "affirmative waiver" cannot be inferred under circumstances such as are involved in the case at bar.

ADDITIONAL REASONS FOR GRANTING THE WRIT

That the use of this type of assistant government agent raises fundamental and substantial issues has already been pointed out by this Court in *Lopes* vs. *United States*, 373 U.S. 427 at 444.

> "This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a

suspect, but sufficient to say here, *the issue is substantial.*" (emphasis added)

In deciding the *Massiah* case, *supra*, the Court intentionally left open the interrelationship between the Fourth Amendment problem, as it is effected by the clandestine interrogation and recordation by aides of government agents. The basic issues have been the subject of extensive examination by the Congress. *Cf.* 87th Cong. 2nd Session "Wiretapping and Eavesdropping" Summary Report of Hearings 1958-61 by the Sub-Committee on Constitutional Rights of the Judiciary United States Senate; and by a broad spectrum of responsible elements of our society. The prosecutive process should be made clear by this Court to preserve, not only the rights of this Petitioner, but of equivalent import, to give proper direction to law enforcement agencies in their investigative activities to insure effective police action only within the framework of proper Constitutional standards.

CONCLUSION

Each of the questions presented herein poses important questions to Federal Criminal Law that should be decided by this Court.

The writ of certiorari should be granted.

W. PAUL FLYNN, Esq.,
Attorney for the Petitioner

FRANK J. RACCIO, Esq.,
BERNARD P. KOPKIND, Esq.,
CHARLES L. FLYNN, Esq.,
Of Counsel.

Date: July, 1964.